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4 **UNITED STATES DISTRICT COURT**
5 **DISTRICT OF NEVADA**

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7 EDWARD CALVILLO

8 Plaintiff,

9 v.

10 EXPERIAN INFORMATION SOLUTIONS,
11 INC.; INNOVIS DATA SOLUTIONS, INC.,;
TRANSUNION LLC;

12 Defendant(s).
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Case No. 2:19-cv-00277-RFB-NJK

ORDER

14 **I. INTRODUCTION**

15 Before the Court is Defendant Experian Information Solutions, Inc.’s (“Experian”) Motion
16 to Dismiss and Plaintiff Edward Calvillo’s (“Plaintiff”) Motion for Leave to File Notice of
17 Supplemental Authority. ECF Nos. 19, 61. For the following reasons, the Court grants the motion
18 to dismiss in part and grants the motion for leave to file notice of supplemental authority.
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20 **II. PROCEDURAL BACKGROUND**

21 Plaintiff first filed complaint against Defendants on February 14, 2019. ECF No. 1. On
22 April 4, 2019, Plaintiff voluntarily dismissed its claims against Defendant Innovis Data Solutions,
23 LLC with prejudice. ECF No. 14. Plaintiff filed the operative amended complaint on April 16,
24 2019. ECF No. 17. Experian filed its instant motion to dismiss on April 30, 2019. ECF No. 19. A
25 response and reply were filed. ECF Nos. 43, 51. Plaintiff dismiss TransUnion, LLC with prejudice
26 from the action on June 11, 2019. ECF No. 53. Plaintiff moved for leave to file notice of
27 supplemental authority on March 9, 2020. ECF No. 61. A response was filed. ECF No. 62.
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1 **III. FACTUAL ALLEGATIONS**

2 In his complaint Plaintiff alleges the following: On or about April 20, 2011, Plaintiff filed
3 for Chapter 13 Bankruptcy in the United States Bankruptcy Court for the District of Nevada
4 pursuant to 11 U.S.C. §1301 et seq. At the time of filing his Bankruptcy petition, Plaintiff owned
5 real property, which was subject to a first mortgage deed of trust. During the pendency of
6 Plaintiff's bankruptcy, the servicing of his loan was transferred to Nationstar Mortgage
7 ("Nationstar"). On October 5, 2011, Plaintiff's Chapter 13 Plan was confirmed. Pursuant to its
8 terms, Plaintiff was to continue to make payments on his mortgage obligation. Subsequently, on
9 July 15, 2016, the bankruptcy court entered its order discharging Plaintiff, finding that among other
10 things, discharge was appropriate because he had fulfilled all requirements under the plan.
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12 All of the defendants, including Experian, are supposed to adhere to the Consumer Data
13 Industry Association ("CDIA")'s Metro 2 reporting standards ("Metro 2"), which provides
14 guidance for credit reporting and FCRA compliance. The Metro 2 format guidelines provide
15 specific instruction for properly reporting a secured debt for which a consumer completes the
16 required payments through a chapter 13 bankruptcy, but continues making payments on the
17 account because it is still open following the bankruptcy, i.e. mortgages. The instruction for
18 consumer reporting agencies ("CRAs") is that the reporting remove any suppression codes
19 associated with bankruptcy reporting "so that ongoing payments made by the consumer can be
20 reported." Id.
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22 Plaintiff alleges that despite the Metro 2 Format's instructions, the defendants, including
23 Experian, failed to conform to the Metro 2 Format when reporting on Plaintiff's accounts after he
24 filed for bankruptcy.
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1 After reviewing a disclosure report on September 1, 2016 pursuant to 15 U.S.C. § 1681g
2 of the Fair Credit Reporting Act (“FCRA”), Plaintiff discovered that Experian had intentionally
3 suppressed positive account history reporting from Plaintiff’s consumer file in the report.
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5 Plaintiff subsequently disputed the disclosure on February 27, 2018 in a letter. The letter
6 included information from Nationstar concerning the omitted payment information. Plaintiff
7 alleges that Experian was required to contact Nationstar by law but did not do so. Experian
8 reinvestigated the claim on March 14, 2018 and claimed that the information that Plaintiff disputed
9 was not reported in Experian’s file at the time of the dispute. Experian then deleted the Nationstar
10 tradeline from the report rather than correct the missing payment information. Plaintiff alleges
11 that this act deprived Plaintiff of positive account history from his consumer file at Experian,
12 thereby depriving Plaintiff of positive credit data that would have provided Plaintiff a fresh start
13 after his bankruptcy filing. Plaintiff now brings claims for violations of § 1681 of the Fair Credit
14 Reporting Act (“FCRA”). 15 U.S.C. §1681. Plaintiff alleges that he suffered actual damages in
15 the form of out-of-pocket transportation costs and lost time, stress and anger. Plaintiff also alleges
16 that by omitting the information concerning his Nationstar payments, Plaintiff’s creditworthiness
17 suffered. Finally, Plaintiff also claims that Experian misrepresented the purposes for which it
18 intended to use Plaintiff’s data, and therefore committed consumer fraud under Nevada state law.
19 Nev. Rev. Stat. § 598.0915; Nev. Rev. Stat. § 41.600
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23 **IV. LEGAL STANDARD**

24 An initial pleading must contain “a short and plain statement of the claim showing that the
25 pleader is entitled to relief.” Fed. R. Civ. P. 8(a). The court may dismiss a complaint for “failure
26 to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). In ruling on a motion
27 to dismiss, “[a]ll well-pleaded allegations of material fact in the complaint are accepted as true and
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1 are construed in the light most favorable to the non-moving party.” Faulkner v. ADT Sec. Services,
2 Inc., 706 F.3d 1017, 1019 (9th Cir. 2013) (citations omitted).

3 To survive a motion to dismiss, a complaint need not contain “detailed factual allegations,”
4 but it must do more than assert “labels and conclusions” or “a formulaic recitation of the elements
5 of a cause of action” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp.
6 v. Twombly, 550 U.S. 544, 555 (2007)). In other words, a claim will not be dismissed if it contains
7 “sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face,”
8 meaning that the court can reasonably infer “that the defendant is liable for the misconduct
9 alleged.” Id. at 678 (internal quotation and citation omitted). The Ninth Circuit, in elaborating on
10 the pleading standard described in Twombly and Iqbal, has held that for a complaint to survive
11 dismissal, the plaintiff must allege non-conclusory facts that, together with reasonable inferences
12 from those facts, are “plausibly suggestive of a claim entitling the plaintiff to relief.” Moss v. U.S.
13 Secret Service, 572 F.3d 962, 969 (9th Cir. 2009).

14 **V. DISCUSSION**

15 The Court will allow Plaintiff’s FRCA claims to proceed but will dismiss the state
16 consumer law claims.

17 **a. The Fair Credit Reporting Act**

18 “Congress enacted the Fair Credit Reporting Act [FCRA] in 1970 ‘to ensure fair and
19 accurate credit reporting, promote efficiency in the banking system, and protect consumer
20 privacy.’” Gorman v. Wolpoff & Abramson, LLP, 584 F.3d 1147, 1153 (9th Cir.
21 2009) (quoting Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, (2007)). “As an important means to
22 this end, the Act sought to make ‘consumer reporting agencies exercise their grave responsibilities
23 [in assembling and evaluating consumers’ credit, and disseminating information about
24 consumers’ credit] with fairness, impartiality, and a respect for the consumer’s right to
25 privacy.’” Id. (alteration in original) (quoting 15 U.S.C. § 1681(a)(4)).

1 **i. Section 1681e(b)**

2 Section 1681e(b) of the FCRA requires the consumer reporting agency to “follow
3 reasonable procedures to assure the maximum possible accuracy of the information concerning the
4 individual about whom the report relates.” 15 USC § 1681e(b). Liability under 1681e(b) “is
5 predicated on the reasonableness of the credit reporting agency's procedures in obtaining credit
6 information.” Guimond v. Trans Union Credit Info. Co., 45 F.3d 1329, 1333 (9th Cir. 1995). To
7 bring a 1681e claim, the “consumer must present evidence tending to show that a [CRA] prepared
8 a report containing inaccurate information.” Guimond, 45 F.3d at 1333. The consumer must also
9 “first make a prima facie showing of inaccurate reporting by the CRA.” Shaw, 891 F.3d at 756
10 (internal citations omitted). Inaccurate for the purposes of FCRA means information that is either
11 “patently incorrect” or is “misleading in such a way and to such an extent that it can be expected
12 to adversely affect credit decisions.” Id. Once the consumer has made a prima facie showing of
13 inaccuracy, he or she must next show that the consumer reporting agency failed to follow
14 reasonable procedures to assure the maximum possible accuracy of the information. 15 U.S.C. §
15 1681e(b).

16 Experian incorrectly implies that a consumer must show that the information would be
17 transmitted to a third party in order to make out a section 1681e(b) claim. But the Ninth Circuit
18 has explicitly held that proof of transmission to a third party is not a prerequisite for making a
19 1681e(b) claim. Guimond, 45 F.3d at 1333 (“Accordingly the district court erred in finding that
20 any liability under 1681e(b) was predicated, as a matter of law, on the occurrence of some event—
21 denial of credit or transmission of the report to third parties—resulting from the compilation and
22 retention of erroneous information.”). Plaintiff also pleads in his complaint that Experian
23 reinvestigations results showed twenty “soft” inquiries, indicating that third parties had been able
24 to view reports with the missing information.

25 The Court finds that Plaintiff has adequately raised a §1681e(b) claim. First, the Court finds
26 that Experian’s omission of the data regarding Plaintiff’s post-discharge payments could be
27 misleading in a way that could adversely affect an individual’s creditworthiness. The Court does
28 not agree with Plaintiff’s contention, which is unsupported by binding authority, that failure to

1 comply with Metro 2 reporting requirements is per se misleading or patently incorrect for FCRA
2 purposes. However, the Court does find that Plaintiff's complaint adequately pleads that payment
3 history is a significant factor in creditworthiness, and that Plaintiff's creditworthiness has been
4 damaged by Experian's failure to include his payments to Nationstar post-bankruptcy. Incomplete
5 information, even if accurate, may nevertheless be misleading. Shaw v. Experian Information
6 Solutions, Inc., 891 F.3d 749, 757 (9th Cir. 2018) ("[A] consumer report that contains technically
7 accurate information may be deemed "inaccurate" if the statement is presented in such a way that
8 it creates a misleading impression.") (internal citations omitted). Experian's arguments that
9 previous courts have found that failure to report post-discharge payments did not constitute an
10 inaccuracy are not persuasive to the Court, particularly because Experian points to no binding
11 authority to support its position. The Court also finds that at this stage in litigation, Plaintiff has
12 sufficiently pled facts to support a claim that Experian did not follow reasonable procedures to
13 assure maximum possible accuracy of the information in the report. Plaintiff pleads that upon
14 information and belief Experian did not notify Nationstar after receiving Plaintiff's dispute letter.
15 Whether this is reasonable is ultimately a question for the finder of fact, but as alleged Plaintiff's
16 claim survives the motion to dismiss phase.

17 Experian cites liberally to Jaras v. Equifax, LLC, an unpublished decision from the Ninth
18 Circuit from 2019, in which the Ninth Circuit found that the plaintiffs lacked standing because
19 they had failed to plead that they were on the verge of imminently embarking on a consumer credit
20 transaction for which the alleged inaccuracies in their credit reports would matter. 766 F.App'x
21 492 (9th Cir. 2019). The Court agrees with Judge Berzon's dissent in Jaras that an allegation that
22 the misreporting of the consumer information lowered an individual's creditworthiness is
23 sufficient to find that there is a concrete injury. Id. (J. Berzon, partially dissenting). Moreover, in
24 a more recent published decision, the Ninth Circuit has confirmed that a concrete injury may be
25 found for a FCRA violation even in cases where the information has not yet been disclosed to a
26 third party and the affected consumers were not about to engage in a relevant consumer credit
27 transaction. Ramirez v. TransUnion LLC, 951 F.3d 1008, 1027 (9th Cir. 2020).

28 Experian next argues that Plaintiff's § 1681e(b) claim is really a disguised § 1681i claim.

1 But as Experian cites no binding authority to support this position, and the Ninth Circuit has never
2 held that a reporting inaccuracy cannot support both a § 1681e(b) claim and a § 1681i claim.
3 Accordingly, the Court dismisses this argument.

4 **ii. 15 U.S.C. 1681i**

5 The Court also finds that Plaintiff sufficiently and plausibly pleads a §1681i claim.

6 Section 1681i(a)(1)(A) outlines the scope of the reinvestigation required by consumer
7 reporting agencies. It states in part:

8 [I]f the completeness or accuracy of any item of information contained in a
9 consumer's file at a [CRA] is disputed by the consumer and the consumer notifies
10 the agency directly . . . of such dispute, the agency shall, free of charge, conduct a
11 reasonable reinvestigation to determine whether the disputed information is
12 inaccurate and record the current status of the disputed information, or delete the
item from the file . . . before the end of the 30-day period beginning on the date on
which the agency receives the notice of the dispute from the consumer .

13 15 U.S.C. §1681i(a)(1)(A).

14 The Court finds that Plaintiff has pled facts sufficient to support its §1681i claim. Experian
15 argues that Plaintiff cannot plead speculative inconsistencies that Experian did not notify
16 Nationstar pursuant to 15 U.S.C. §1681i(a)(2). But the Court does not find that Plaintiff's claims
17 that Experian did not reasonably reinvestigate the dispute to be purely speculative and therefore
18 upholds the claim.
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20 **iii. Willfulness and Actual Damages**

21 Plaintiff further argues that Experian's actions were willful. The FCRA allows parties to
22 claim punitive damages and actual damages of up to \$1,000 for willful violations of the FCRA. 15
23 U.S.C. § 1681n. To show willfulness and be granted statutory damages under the FCRA, a
24 consumer must show that a defendant knowingly or recklessly violated the FCRA. Shaw, 891 F.3d,
25 at 760. A court may find that a defendant has behaved recklessly when the defendant's "action
26 both is 'a violation under a reasonable reading of the statute's terms' and 'shows that the company
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1 ran a risk of violating the law substantially greater than the risk associated with a reading that was
2 merely careless.” Shaw, 891 F.3d at 760 (internal citations omitted). The Court does not find on
3 the facts alleged that Plaintiff has sufficiently alleged that Experian’s violations were willful.
4 Therefore, the Court dismisses any requests for punitive damages. The Court does find however,
5 that Plaintiff may have actual damages which he is entitled to prove as the case proceeds.
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8 **b. State Law Claim for Deceptive Trade Practices**

9 Plaintiff also brought a claim for deceptive trade practices under NRS 598.0915 and
10 through NRS 41.600, which allows persons to bring causes of action for consumer fraud. Nev.
11 Rev. Stat. § 41.600. NRS 598.0915 precludes a variety of practices, including making knowing
12 false representations as to the use of goods or services for sale. Nev. Rev. Stat. §598.0915. The
13 Court finds that Plaintiff’s claim that Experian violated NRS 598.0915 is wholly unsubstantiated.
14 Plaintiff only vaguely alleges that Experian warranted it would not sell Plaintiff’s data for
15 “permissible” purposes, but actually uses Plaintiff’s data for impermissible purposes. But Plaintiff
16 does not allege what the permissible or impermissible purposes are, or the type of consumer data
17 it contends Experian impermissibly sells. Plaintiff therefore does not allege enough facts for the
18 Court to even determine whether he has pled a plausible NRS 598.0915 claim. In Plaintiff’s
19 response to the Experian’s motion to dismiss, Plaintiff inexplicably references facts that were not
20 alleged in the complaint concerning use of Plaintiff’s address. It is axiomatic that a party may not
21 amend its complaint through its opposition to a motion to dismiss. A party must not amend its
22 pleadings in briefs filed in opposition to a motion to dismiss. Schneider v. Cal. Dep’t of Corrs.,
23 151 F.3d 1194, 1197 n.1 (9th Cir. 1998). Accordingly, the Court dismisses this claim.
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1 **c. Leave to Amend**


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3 When granting a motion to dismiss, courts are generally encouraged to grant leave to
4 amend if amendment would not be futile. Eminence Capital, LLC v. Aspeon LLC, 316 F.3d 1048,
5 1051 – 52 (9th Cir. 2003). The Court will grant Plaintiff leave to amend his complaint to address
6 the factual deficiencies in his state law consumer fraud claim.

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8 **VI. CONCLUSION**

9 **IT IS THEREFORE ORDERED** that Defendant Experian Information Solution Inc's
10 Motion to Dismiss (ECF No. 19) is denied in part and granted in part. The Court allows Plaintiff's
11 Fair Credit Reporting Act claims to proceed but dismisses the state law claims under NRS
12 598.0915 and NRS 41. 600. Plaintiff may file an amended complaint within fourteen days of the
13 date of this order.

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15 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Leave to File Supplemental
16 Authority (ECF No. 61) is granted nunc pro tunc.

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18 DATED March 31, 2020.

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22 _____
23 **RICHARD F. BOULWARE, II**
24 **UNITED STATES DISTRICT JUDGE**
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